No. 09-302

In The

Supreme Court of the United States

SCOTT KERNS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where state law expressly recognizes the tort of negligent investigation, may a federal court disregard this state law under the Federal Tort Claims Act on the grounds that the tort is akin to the intentional tort of false arrest?

2. Are Drug Enforcement Agency case analysts, whose responsibilities include issuance of administrative subpoenas and identifying the persons in a wiretap investigation to be arrested, "law enforcement officers" for purposes of section 28 U.S.C. § 2680(h)?

PARTIES TO PROCEEDING

Petitioner is Scott Curtis Kerns, Plaintiff in the District Court and Appellee in the Court of Appeals.

Respondent is the United States of America, named as Defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*

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PETITION FOR WRIT OF CERTIORARI

Arizona appellate courts have expressly recognized that law enforcement officers may be held liable for their grossly negligent investigations, independent of the intentional torts of false arrest and malicious prosecution. Following a three-day bench trial, the district court found that the conduct of Drug Enforcement Agency intelligence analysts was grossly negligent and recklessly indifferent, and awarded damages to Petitioner Scott Curtis Kerns. The United States Court of Appeals for the Ninth Circuit, however, reversed, rejecting Arizona's application of negligence principles to police investigations and finding that Mr. Kerns' claims were akin to false arrest, an intentional tort for which the analysts were not liable under the Federal Tort Claims Act (the "FTCA").

The Ninth Circuit's decision permits federal courts to disregard the express provisions of state law, notwithstanding the FTCA's incorporation of state law, *see* **28 U.S.C. § 2674**. Moreover, the conduct sought to be prescribed by the tort of negligence differs significantly from that of the intentional tort of false arrest. At the very least, intelligence analysts, like the increasing number of investigative support personnel routinely relied upon by law enforcement officers, should be deemed "investigative officers" for purposes of the FTCA's law enforcement exception to the intentional tort rule.

The use of "lay" investigators in police investigations, including laboratory and evidence technicians and, in the case at hand, intelligence analysts, has become increasing prevalent. The role of the Federal Tort Claims Act in compensating victims of the gross negligence of these individuals is an issue of nationwide importance. Accordingly, for the reasons set forth herein, Petitioner Scott Kerns respectfully petitions this Court for a writ of certiorari to review the decision of the Ninth Circuit.

DECISIONS BELOW

The district court's findings of fact and conclusions of law following the bench trial in this matter is attached as *Appendix 4-64* and is reported at *Kerns v. United States*, 2007 WL 552227 (D.Ariz. 2007). The memorandum decision of the United States Court of Appeals for the Ninth Circuit is attached as *Appendix 1-3* and is reported at *Kerns v. United States*, 2009 WL 226207 (9th Cir. 2009).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on January 28, 2009. *Appendix 1-3.* On March 16, 2009, Petitioner filed a timely request for panel rehearing and suggestion for rehearing en banc. This request for rehearing was denied by order dated June 8, 2009.

Appendix 66. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1346(b)(1) provides that:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. § 2680(h) provides in pertinent part that:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,

slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

3. 21 U.S.C. § 876(a) provides that:

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a

witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpoena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

4. 21 U.S.C. § 878(a) provides that:

Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may –

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

STATEMENT OF THE CASE

In the spring of 2001, federal agents, as part of a comprehensive narcotics investigation, intercepted several inculpatory telephone calls to and from one Scott Michael Kernes of Yuma, Arizona. Based upon these telephone calls, federal law enforcement intelligence analysts subpoenaed the telephone records for Mr. Kernes, obtaining, his full name, address, birthday, social security number, and driver's license number.

However, in inputting the information about Mr. Kernes into the investigation's database, the intelligence analysts misspelled Mr. Kernes' name, inputting instead the name of "Scott Kerns." Thereafter, as the analysts prepared the "grand jury and arrest packets" for the case agents, the analysts utilized only the name of "Scott Kerns" to obtain information from the Arizona Department of Motor Vehicles. The DMV provided the analysts with a photograph, address, and driver's license number for Scott Curtis Kerns, also a Yuma resident, but one who had no connection to the drug conspiracy whatsoever. Without cross-checking this information against the raw data from the telephone company, heavily-armed federal agents arrested Scott Curtis Kerns at his

home, resulting in his incarceration for approximately four days until the error was acknowledged.

In Mr. Kerns' subsequent suit under the Federal Tort Claims Act, the district court found in Mr. Kerns' favor, finding the analysts' conduct to be "recklessly indifferent." *Appendix 35.* The district court stated:

> [G]ross negligence occurred at the third and final stage of the analysts' investigation into the identity of the subscriber for cell phone number (520) 580-8248. The analysts were recklessly indifferent when they failed to compare the identity of "Scott Curtis Kerns" as listed in the target folder against the primary data incompletely summarized in the Pen Link database. Even the most cursory check between the two data sets, which could have been performed in just five to ten minutes, would have revealed the discrepancy between the home address for Scott Kerns provided by the Yuma DMV . . . and the subpoena-derived address for Scott Kernes in the Pen Link database. . . . That review would have led the analysts back to the subpoena return with its multiple unique identifiers conclusively exculpating Plaintiff and inculpating Scott Kernes. The court, like Special Agent Carter, finds the analysts' failure to act inconceivable.

Appendix 35-36.

FACTUAL BACKGROUND

I. Introduction

Sometime in 1999, the Drug Enforcement Agency ("DEA"), the United States Customs Service, and the Federal Bureau of Investigation ("FBI") joined with other state and local law enforcement members of the Southwest Border Alliance Task Force to investigate a drug importing crime syndicate operating in and around Yuma, Arizona. *Appendix 7*. The DEA was the lead agency in what came to be known as "Operation Prickly Pear." The investigation, which came to a close on September 9, 2001, included but was not limited to surveillance, wiretaps, interviews, and undercover operations. *Id.*

In the course of the investigation, an individual later identified as Scott Michael Kernes was overheard on at least three wiretap intercepts discussing issues relating to the drug trafficking conspiracy. *Id.* However, the evidence gleaned from these wiretap intercepts did not result in the arrest of Scott Michael Kernes. *Appendix 7-8*. Instead, federal officers arrested Scott Curtis Kerns, a resident of Yuma and the Plaintiff in this matter, an individual who has no relationship to Scott Michael Kernes or the drug conspiracy in this matter. *Appendix 8*. Plaintiff was mistakenly indicted by an Arizona grand jury on January 10, 2002, and apprehended by heavily armed federal agents outside his Yuma home on January 28, 2002. *Id.* Finally, several days later, a sympathetic judge and prosecutor listened to his pleas that the

Government had arrested the "wrong" Scott Kernes and, following a brief investigation, ordered his release. *Appendix 9.* As the district court noted, Mr. Kerns' arrest was the product of "grave errors." *Appendix 10.*

II. The Investigation

Special Agents Carl Geohegan and George Carter, from the FBI and the Customs Service respectively, were the case agents responsible for monitoring the wiretaps for information about the drug trafficking conspiracy. *Id.* The numerous wiretap intercepts yielded a correspondingly large amount of data, consisting of captured telephone numbers and information relating to the date, time, duration, and type (local, long-distance or cell phone) of each call. *Id.* The case agents relied exclusively upon four intelligence analysts to extract positive suspect identifications from these raw data and, more significantly, in seeking indictments and effecting arrests of the suspects. *Appendix 11.* There was no independent verification of the suspect identifications provided by the analysts. *Id.* DEA agent Angeline Woolbright, who received formal investigative training from the FBI, was the Operation's lead analyst. *Appendix 12.* The three other analysts came from the DEA (Cynthia Carlon-Canales), the U.S. Customs Service (Frank Gonzalez), and the Arizona National Guard (Bob Baldwin). *Id.*

The four Task Force analysts were jointly responsible for researching the wiretap data and delivering the name of the person whose statements had been intercepted, along with other points of identification. *Id.* The analysts established a three-step procedure to identify each suspect. *Id.* First, Agent Woolbright and her colleagues made an initial suspect identification by matching the telephone numbers captured by the wiretaps with subscriber information subpoenaed from telephone companies. *Id.* They used a data management computer program to store the suspect's name and some other primary data extracted from the administrative subpoena returns. *Id.* Second, the analysts used the name provided by the telephone companies, and nothing else, to request a photograph and other file data from the Arizona Department of Motor Vehicles ("DMV") in Yuma, Arizona. *Id.* Lastly, the analysts created a target folder summarizing the data delivered to them by the Yuma DMV and finally identifying the suspect. *Id.* The analysts never confirmed the accuracy of their final suspect identification by reference to any of the primary data provided to them by the telephone companies at the first stage of the investigation. *Id.* The federal case agents and Arizona prosecutors relied exclusively upon the suspect target folders assembled by the analysts for suspect identifications. *Id.*

The analysts performed their duties independently. *Appendix 12.* Although she was the lead analyst, Agent Woolbright did not exercise supervisory authority over her peers in the intelligence room.

Id. The four analysts shared investigative responsibilities equally amongst themselves. *Id.* Furthermore, there were no procedural manuals or other written directives defining the analysts' responsibilities in Operation Green Prickly Pear. *Id.* The analysts established and implemented their suspect identification policy without formal oversight. *Id.* No single case officer was assigned to oversee the analysts. *Id.* Instead, each analyst reported directly to his or her supervisor at the DEA, the National Guard, or the U.S. Customs Service, respectively. *Id.*

The analysts began each investigation by seeking the subscriber identity for the phone used to initiate or receive each intercepted telephone call. *Appendix 13.* The analysts sent administrative subpoenas to various telephone companies to obtain this information. *Id.* Throughout the course of the Operation, Agent Woolbright and her fellow analysts prepared four to five hundred such subpoenas, with each subpoena containing requests for subscriber information on 15 to 20 phone numbers. *Id.* The telephone companies responded by faxing the requested information to the intelligence room. *Id.* The amount of subscriber data actually produced varied by telephone company. *Id.* The analysts relied entirely upon the administrative subpoenas, which formed the only link between the intercepted criminal activity and the suspect. *Id.*

In Mr. Kerns' case, intelligence analyst Cynthia Carlon-Canales and Special Agent Chris Woolbright, both of the DEA, sent an administrative subpoena on

June 11, 2001, requesting subscriber information for intercepted cell phone number (520) 580-8248. *Appendix 14*; *see also Ninth Circuit Supplemental Excerpt of Record, Tab 5* (Administrative Subpoena Upon MCI). MCI WorldCom responded to the subpoena on June 13, 2001, providing detailed and correct information about Scott Kernes, the cell phone subscriber. *Appendix 14*. The subpoena return included six identifying data points for Scott Kernes: 1) name, 2) home address, 3) work, home and cell phone numbers, 4) Social Security number, 5) Arizona driver's license number, and 6) date of birth. *Id.*

Upon receipt of the subpoena return, the Task Force analysts entered some of the identifying information contained therein into a DEA database called "Pen Link." *Appendix 14*. Pen Link is a commercially available data management tool that the intelligence analysts used to collect and sort wiretap information. *Id.* Angeline Woolbright and the other three analysts received training on how to enter telephone data from the subpoena returns into the Pen Link database. *Id.* The Pen Link program featured multiple tabs containing data fields for a range of information. *Appendix 15*. The first tab contained fields for first, middle, and last names, phone number, address, and source of the subscriber information. *Id.* Additional tabs contained fields for more specific identifying data such as known aliases, associates, bank accounts, vehicles, and unique identifiers such as driver's license numbers, FBI numbers, Social Security numbers, dates of birth, height, weight, and physical descriptions. *Id.*

Many of the Pen Link data fields could be completed on the basis of information provided by the telephone companies in the subpoena returns. *Id.* In general, however, the analysts only completed the data fields located on the first tab of the Pen Link program, which included the suspect's name, phone number, address, and the name of the telephone company that provided the subscriber information. *Appendix 15.*

Following standard analyst procedure, at some point between June 13, 2001, and July 17, 2001, one of the analysts retrieved the subpoena return from MCI WorldCom for Scott Kernes and entered the identifying data contained therein into the first tab of the Pen Link database. *Appendix 15-16.* However, the analyst mistakenly typed the name "Scott Kerns" into the Pen Link database while entering the remainder of Scott Kernes' subscriber information into the first tab of the data management program. *Appendix 16.* This clerical error is illustrated by the Pen Link data report dated November 16, 2001, showing the incorrect name "Kerns, Scott" next to the "real" Scott Kernes' true address, 533 19th Avenue. *Id.* This error was compounded by the analysts' policy of not entering any additional identifying information beyond the suspect's name, phone number, and address into Pen Link. *Id.* Although the analysts conceived of Pen Link as an "evolving database," which could be updated and changed as additional information about a particular suspect was uncovered, Scott Kernes' Social Security number, Arizona driver's

license number, and date of birth were never entered into the program, and the misspelling of his name was never corrected. *Id.*

After inputting the limited subscriber data from the subpoena return into Pen Link, the analysts placed the telephone company records in a four-drawer filing cabinet located in a central file room down the hall from the intelligence room. *Appendix 16.* However, later subpoena return retrieval formed no part of the analysts' investigative procedure. *Appendix 17.* The analysts made their initial suspect identification by subpoena return and selective Pen Link data entry. *Id.* From that point on, the Pen Link database was assumed to be a reliable proxy for the telephone records it incompletely summarized. *Id.* The analysts made no attempt at any point in the investigation to check the data contained in the computer program against the underlying inculpatory data in the subpoena return. *Id.* The subpoena return was the only link between the criminal conduct observed and the person indicted for that conduct. *Id.*

Scott Michael Kernes' subpoena return was treated like all of the others. *Appendix 17.* His telephone records were stored in the file room after one of the analysts mistyped his name as "Scott Kerns," but accurately completed the balance of the data fields contained in the first tab of Pen Link. *Id.* The subpoena return plainly inculpating Scott Michael Kernes and exculpating Plaintiff was not retrieved or reviewed until prosecuting attorney Billie Rosen

asked federal agents to investigate the possibility of Plaintiff's mistaken arrest on January 30, 2002. *Id.*

Pen Link was not a case management system. *Appendix 18.* The database was not designed to store the information that would be used to seek suspect indictments and prosecutions. *Id.* This was the function of the "target folder," which was a paper folder containing the results of the analysts' investigation. *Id.* The target folder contained a summary of the identifying data retrieved from the Arizona DMV, other documents derived from the records of the Motor Vehicles Department, criminal history records, vehicle registrations, and commercially available credit reports. *Id.* Significantly, the analysts chose not to place a copy of the administrative subpoena return in the target folder. The subpoena return data summarized in Pen Link were also excluded. *Id.* As a result, Special Agent Carter used entirely secondary information, not primary telephone data, to indict and apprehend each alleged member of the drug trafficking conspiracy. *Id.*

The intelligence analysts used the information stored in the Pen Link database to obtain further data on the identity of the suspected drug traffickers from the Arizona Department of Motor Vehicles. *Appendix 19.* The initial reason given for seeking driver's license files was to obtain a photograph so that the agents could recognize their suspects. *Id.* The analysts prepared hand-written lists of suspect names from the Pen Link database, and then gave these lists to Arizona Department of Safety Officer

Brian Turner. *Id.* Officer Turner used the names provided by the intelligence analysts to obtain a printout of each suspect's Arizona driver's license record, which included the person's full name, driver's license number, date of birth, home address, sex, eye color, height and weight, along with a color photograph of the suspect stored on a computer disc. *Id.*

In Mr. Kerns' case, one of the intelligence analysts provided the name "Scott Kerns," without more, to Arizona Department of Safety Officer Turner on July 17, 2001. *Appendix 19-20.* Whenever time permitted, Agent Woolbright included a unique identifier in addition to a name when making requests to the DMV. *Appendix 20.* But this was not standard analyst procedure, and it did not occur in this case. *Id.* Plaintiff's mistaken arrest and prolonged detention became recklessly probable when the analyst failed to include in the request for controlling identifying information for "Scott Kerns," such as the suspect's Social Security number or Arizona driver's license number, and failed to compare the DMV return to the telephone subpoena return. *Id.* Mr. D.P. Van Blaricom, a credible expert in police investigative practices, testified that misidentification is likely when a positive suspect identification is sought in the absence of at least one unique identifier. *Id.* If a unique identifier had been provided to Officer Turner, he would have retrieved the correct suspect's records from the DMV, notwithstanding the fact that he was given the incorrect name, "Scott Kerns." *Id.*

Following her standard procedure, Angeline Woolbright created a Microsoft Word document summarizing Scott Curtis Kerns' driver's license records sometime between July 17, 2001, and July 27, 2001. *Appendix 21.* The document contained a computer image of Plaintiff, along with his date of birth and driver's license number. *Appendix 22.* The analyst printed the Word document, affixed one copy to the wall of the wire room for use by operational surveillance officers, and placed another copy in the Scott Kerns target folder. *Id.* The stated purpose for seeking the DMV records was just to obtain a suspect photograph. *Id.* Yet the driver's license data were the only identifying data included in the suspect folder, and the only data the analysts ever again considered. *Id.* Though there was no plan for doing so, in effect the Task Force analysts completely ousted the persona from the telephone subpoena return for the persona on the driver's license. This ouster caused Special Agent Carter to testify before the Arizona grand jury seeking Plaintiff's indictment. *Id.*

PROCEEDINGS BELOW

Mr. Kerns filed his initial complaint in this matter on September 16, 2004. *District Court Docket 1.* The matter proceeded to trial on Mr. Kerns' negligence and false arrest claims under the Federal Tort Claims Act on December 12, 2006. *District Court Docket 67.* Following the three-day bench trial, the district court issued its findings of fact and conclusions

of law on February 21, 2007. *Appendix 4-64.* The district court ruled that the analysts' conduct was grossly negligent, and awarded Mr. Kerns $200,000.00 in damages. *Id.*

The United States Court of Appeals reversed in a memorandum decision dated January 28, 2009. *Appendix 1-3.* The Ninth Circuit held that intelligence analysts were not "investigative or law enforcement officers" who may be held liable for false arrest under the FTCA, and further held that Mr. Kerns' negligence claim was, in essence, a claim for false arrest, not cognizable against the civilian intelligence analysts. *Appendix 3.*

REASONS FOR GRANTING THE WRIT

1. Since Grossly Negligent Investigation Is A Proper Tort Under Arizona Law, The Ninth Circuit Wrongfully Rejected State Law In Reversing The Negligence-Based Verdict In Mr. Kerns' Favor.

The Ninth Circuit held that Mr. Kerns' negligence claim was simply a false arrest claim "relabeled" and, therefore, reversed the district court's negligence verdict in Mr. Kerns' favor. However, since negligence is a legitimate and proper claim for relief under Arizona law, by definition, Mr. Kerns' claim was a proper claim under the FTCA.

Under the FTCA, "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305, 112 S.Ct. 711, 714 (1992). Arizona law has long recognized that both public and private actors, including police officers, are responsible for the consequences of their actions. In *Doe ex. rel. Doe v. State of Arizona*, 200 Ariz. 174, 24 P.3d 1269 (2001), the Arizona Supreme Court considered Arizona's relatively new "immunity" statutes, Arizona Revised Statutes sections 12-820.01 and 12-820.02. The Arizona Supreme Court noted that the legislature, in enacting the statutes, intended that "the public policy of this state [is] that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." *Id.* at 175, 24 P.3d at 1270 (citing 1984 Ariz. Sess. Laws Ch. 285, § 1). In other words, state actors would be governed by the same principles applied to the remainder of Arizona's citizens and residents. *Id.* The legislature further provided that "all provisions within A.R.S. §§ 12-820 through 12-826 are to be interpreted with a view to carry out the above legislative purpose." *Id.*

It is with this general jurisprudential background that the Arizona Supreme Court and Arizona Court of Appeals issued their rulings in *Cullison v. City of Peoria*, 120 Ariz. 165, 584 P.2d 1156 (1978) and *Landeros v. City of Tucson*, 171 Ariz. 474, 831 P.2d 850 (App. 1992). In *Cullison*, the plaintiff contended that the defendant's police officers were guilty of

gross negligence in arresting him for the crime of armed robbery and in thereby causing him to be imprisoned. The Arizona high court specifically ratified this claim for relief, noting that "[t]o sustain his position the plaintiff has to show that there was a fact question on the issue of gross negligence." *Cullison*, 120 Ariz. at 167, 584 P.2d at 1158.

In *Landeros v. City of Tucson*, 171 Ariz. 474, 831 P.2d 850 (App. 1992), the Arizona Court of Appeals reaffirmed the rule of *Cullison*, noting that "[i]t would appear that in Arizona the city may be liable if its police officers are grossly negligent in their investigation of a crime which results in an arrest." *Id.* at 475, 831 P.2d at 851. The *Landeros* Court, as in *Cullison*, found that the plaintiff had not satisfied the burden of showing gross negligence in the case before it.

Arizona appellate courts have thereby expressly acknowledged that police officers, like any other person in Arizona, must conform their conduct to a reasonable standard of care. *See Cullison, supra; Landeros, supra.* Mr. Kerns has done nothing to "sidestep" the FTCA, but has done nothing more than plead – and prove – a viable claim under the common law of the State of Arizona. *See also Cleveland v. City of Detroit*, 275 F.Supp.2d 832, 842 (E.D.Mich. 2003) (recognizing a similar claim of gross negligence under Michigan law). In this matter, the district court – a longtime Arizona practitioner – conducted an exhaustive survey of Arizona law, concluding that Arizona recognized this tort. *Appendix 30-34.*

The FTCA provides that liability of the United States for the acts of its employees is determined "in accordance with the **law of the place where the act or omission occurred.**" **28 U.S.C. § 1346** (emphasis added). "Law of the place" does not mean federal law; the FTCA was not intended as a mechanism for enforcing federal statutory duties. *Howell v. United States*, 932 F.2d 915, 917 (11th Cir. 1991). Instead, "the FTCA was designed to provide redress for ordinary torts recognized by state law." *Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001); *see also Washington v. Drug Enforcement Admin.*, 183 F.3d 868, 873 (8th Cir. 1999).

In *Johnson v. Sawyer*, 47 F.3d 716 (5th Cir. 1995), an *en banc* panel of the Fifth Circuit addressed the relationship of state law to the FTCA, holding that:

> The teaching of these authorities is that the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a nonfederal context. If the requisite relationship and duty exist, then the statutory or regulatory violation may constitute or be evidence of negligence in the performance of that state law duty.

Id. Put simply, the scope of the duty under the FTCA is defined by direct reference to state law.

In *Kerns*, the Ninth Circuit created a clear split in the circuits – notably, among others, the Fifth Circuit's ruling in *Johnson* – by holding that Arizona law is *irrelevant* if inconsistent with the perceived purpose of an FTCA exclusion. The Ninth Circuit held that upholding the negligence verdict in Mr. Kerns' favor "would permit evasion of the substance of § 2680(h)'s exclusion of liability." *Appendix* 3. Put simply, the Ninth Circuit has held that the FTCA's ***explicit incorporation*** can be overridden by an unwritten "policy" underlying an FTCA exclusion.

This new restriction on the application of state law in FTCA matters has significant implications for the construction of the FTCA nationwide. The Ninth Circuit has created an ill-defined exception to the rule that state law governs the rules of liability for federal employees under the FTCA. The Ninth Circuit's rejection of state law is unprecedented, and Petitioner Scott Kerns respectfully requests that this Court issue a writ of certiorari to resolve this split among the circuits and clarify the role of state law in establishing the relevant duties and claims for relief.

2. The District Court Read Both the Plain Language and Legislative Intent of 28 U.S.C. § 2680(h) Too Narrowly When It Concluded That DEA Intelligence Analysts Did Not Come Within The Section's "Law Enforcement" Exception To False Arrest Claims.

As the district court correctly noted, Mr. Kerns not only asserted a claim of gross negligence against the United States, but also that of false arrest and imprisonment. However, the district court and Ninth Circuit concluded that the investigative analysts were not "investigative or law enforcement officers" subject to liability for the tort of false arrest. *See Appendix 2-3; 43-45.*

As a general rule, the United States has not waived its sovereign immunity in the Federal Tort Claims Act for false arrest and imprisonment. *See* 28 U.S.C. § 2680(h). However, in 1974, Congress amended this subsection of the FTCA to expressly exempt "investigative and law enforcement officers" from this retention of sovereign immunity. *Id.* Specifically, sovereign immunity waived false arrest and imprisonment claims "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." *Id.* Such officers were defined to include "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* As law enforcement agencies increasing rely on "civilian" employees to conduct

investigations, Petitioner Scott Kerns respectfully requests that this Court grant certiorari to determine when such civilian employees, such as the "intelligence analysts" utilized by the Drug Enforcement Agency and United States Customs Service fall within this broad definition of "investigative or law enforcement officers."

a. The Plain Language Of Section 2680(h) Demonstrates That Congress Intended To Include DEA Intelligence Analysts Within Its Scope.

"It is a well-recognized rule of statutory construction that the plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results." *Eisinger v. Federal Labor Relations Authority*, 218 F.3d 1097, 1102 (9th Cir. 2000) (quotation and citations omitted). A related maxim, explaining the "plain meaning" of a statute, is that "the use of a disjunctive [i.e., the word 'or'] in a statute indicates alternatives and requires that they be treated separately." *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975); *see also United States v. Arreola*, 467 F.3d 1153, 1157 (9th Cir. 2006) ("The two prongs of the statute are separated by the disjunctive 'or,' which, according to the precepts of statutory construction, suggests the separate prongs must have different meanings") (quoting *United States v. Combs*, 369 F.3d 925, 931 (6th Cir. 2004)), *cert. denied*, 551 U.S. 1147, 127 S.Ct. 3002 (2007).

The first relevant prong of the statute is that exempting "investigative or law enforcement officers" from immunity for false arrest claims. **28 U.S.C. § 2680(h)**. By using the disjunctive, Congress included two separate persons in this exemption, "investigative officers" and "law enforcement officers," indicating that the exemption applies not only to "traditional" law enforcement officers, i.e., FBI agents, DEA agents, etc., but also to those with "investigative" duties. Here, the Intelligence Analysts assigned to the project fall squarely within this definition. The lead analyst, Angeline Woolbright, testified:

> Q. Generally speaking, would you describe what an intelligence analyst does for the DEA?
>
> A. Generally speaking, we are called an intelligence research specialist because we research individuals and information to corroborate data received through the investigation and to help provide investigative leads. We also handle a lot of the phone data when there's telephones involved in the investigation.

See Supplemental Excerpt of Record Tab 1; *see also id.* at p. 29 ("And your job was to research, corroborate, or provide investigative leads to the agents? A. That's correct"). FBI Agent Carl Geohegan, who was also part of the Operation Prickly Pear team, similarly testified that, for Operation Prickly Pear, the "[a]nalysts would compile data from the pen registers

and from subscriber information and put that into a database called pen-link." **12/13/06 RT 67**. The role of the analysts in this operation (and other similar investigations) cannot be understated: they provided the link between intercepted telephone calls and an actual person.

The intelligence analysts were part of the "investigative" team. Moreover, they fell within the specific definition of such officers in section 2680(h), namely, officers who were "empowered by law to execute searches, to seize evidence, or to make arrests." **28 U.S.C. § 2680(h)**. Again, the use of the disjunctive indicates that the person at issue needs to have only one of these three powers in order to qualify as an "officer" subjecting the United States to suit for false arrest.

Title 21, Section 876 of the United States Code authorizes the attorney general to issue administrative subpoenas for any witnesses or materials "the Attorney General finds relevant or material to the [controlled substances] investigation." **21 U.S.C. § 876**. As one court has noted, the Congressional grant of authority to issue such subpoenas for drug investigations is "broader than that customarily granted to agencies by Congress," reflecting Congress' "grave concern . . . that there should be effective methods of dealing with illegal drug manufacturing and distribution." *United States v. Hossbach*, 518 F.Supp. 759, 767 (E.D. Pa. 1980); *see also United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir. 1998) ("Section 876 was written to give the DEA broad

powers to investigate violations of federal drug laws and provides no express right to challenge the Attorney General's subpoenas issued under it") (quotation and citations omitted), *cert. denied*, 526 U.S. 1060, 119 S.Ct. 1376 (1999). Moreover, while the statute grants this sweeping subpoena power to the Attorney General, there is no dispute that this power may (indeed, must) be delegated to those in charge of or working on specific investigations, whether a law enforcement officer or simply an employee. *See* **21 U.S.C. § 878(a)(2)**. Section 878(a) provides that

> (a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may –
>
> (1) carry firearms;
>
> (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

> (4) make seizures of property pursuant to the provisions of this subchapter; and
>
> (5) perform such other law enforcement duties as the Attorney General may designate.

21 U.S.C. § 878(a).

In the present matter, the authority and obligation to issue administrative subpoenas pursuant to 21 U.S.C. § 876 were delegated to the intelligence analysts, including lead analyst Angeline Woolbright. She testified:

> Q. Can you estimate the number of administrative subpoenas that might have been issued of which you were aware, that might have been issued during Operation Prickly Pear?
>
> A. At least 4 or 500. And each subpoena would have multiple – typically have multiple numbers on them. I think we were limited to putting 15 to 20 numbers on a given subpoena. And we would try to do that and combine it as much as possible.

12/14/06 RT 12, Ninth Circuit Supplemental Excerpt of Record Tab 1. Case agent Geohegan confirmed that it was the intelligence analysts' responsibility to issue the administrative subpoenas:

> Q. In the course of your involvement with Operation Green Prickly Pear did the

> case agents, the four that you described, did the case agents themselves do the subpoenas to the telephone companies and go through the returns by the telephone companies?
>
> A. Not from the numbers that were generated off the pen registers.
>
> Q. Who did that?
>
> A. My understand, that was from the analysts.

12/13/06 RT 69.

Put simply, in the present investigation, the power to seize evidence by way of potent administrative subpoenas was delegated to the intelligence analysts, as is expressly permitted by **21 U.S.C. § 878(a)**. As such, the intelligence analysts were "investigative . . . officers" empowered by law to "seize evidence" by way of subpoenas. Thus, they fall within the broad category of individuals identified by Congress as coming within section 2680(h)'s "false arrest" exception, and the verdict in favor of Mr. Kerns should be sustained on this separate basis as well.

b. The Legislative History Of Section 2680(h) Demonstrates That Congress Intended To Include DEA Intelligence Analysts Within Its Scope.

As noted above, the language employed by Congress was broad, covering far more than simply the

"typical" federal law enforcement agent. The legislative history demonstrates that this Congress intended the amended statute (the law enforcement exception to false arrest immunity) to have a broad scope. "The measure was designed to 'provid(e) a remedy against the Federal Government for innocent victims of Federal law enforcement abuses.'" *Caban v. United States*, 671 F.2d 1230, 1235 (2d Cir. 1982) (quoting S.Rep.No. 93-588, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.Code Cong. & Ad.News 2789, 2792). In fact, the present case is notably similar to the abuses that led Congress to enact the law enforcement section in the first place. Specifically, federal narcotic agents had conducted at least two "no knock" searches, "enter[ing] the two houses without warrants in violation of the Federal 'no-knock' statute, kick[ing] in the doors without warning, shouting obscenities, and threatening the occupants with drawn weapons." S.Rep.No. 93-588, 1974 U.S.C.C.A.N. 2789, 2790-91 (1973). However, "[t]he terrified inhabitants were only temporarily relieved when the agents left after discovering that they had entered the wrong houses." *Id.* The victims, the Senate noted, were without any remedy against the Government.

> Since they were not then suspects, nor are they now Federal defendants, they cannot move in a prosecution to suppress evidence, the traditional remedy for violation of Fourth Amendment rights. Indeed there was not any evidence seized in these raids because, of

> course, the agents were at the wrong addresses. Furthermore, neither family can recover from the Federal Government in a civil action because of the doctrine of sovereign immunity.

Id. "The injustice of the provision [immunizing federal agents] should be manifest – for under the Federal Torts Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid." *Id.*

Scott Kerns faced the same dilemma as the homeowners who motivated the "law enforcement exception" in the first instance. He is, indisputably, completely innocent. His only relationship to the crime at issue is that he has a name that sounds like (but is not spelled the same) as the actual culprit. Nonetheless, due to the gross negligence of the federal law enforcement employees, he was subject to arrest at the hands of numerous, heavily-armed agents, shackled, processed, transported to the Maricopa County Jail, and incarcerated for four days before the error was finally acknowledged. It is inconceivable that Congress intended to provide a remedy to homeowners whose homes were mistakenly searched, but not for the individual who was arrested and incarcerated for four days simply because federal law enforcement employees grossly negligently misspelled his name. In short, both the plain language of

section 2680(h), as well as its legislative history, demonstrates that the gross negligence by the DEA's intelligence analysts is precisely the type of harm that Congress sought to remedy.

As documented by such television shows as *C.S.I.*, law enforcement agencies are increasingly relying on civilian employees, such as evidence technicians and intelligence analysts, to perform much of a criminal investigation. In using the terms "**investigative or** law enforcement officers" in section 2680(h), Congress clearly envisioned that such investigative officials would fall within the ambit of the FTCA. This application of the FTCA to such civilian investigative employees presents an issue of significant nationwide import, and Mr. Kerns urges this Court to grant his petition for writ of certiorari accordingly.

CONCLUSION

This matter presents two important issues under the Federal Tort Claims Act, including a federal court's obligation to accept torts adopted by a state's highest court, and whether civilian investigative employees fall within the FTCA's definition of an "investigative or law enforcement officer." Accordingly, for the reasons set forth herein, Petitioner respectfully requests that this Court grant his petition for writ of certiorari in this matter.

RESPECTFULLY SUBMITTED this 8th day of September, 2009.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT KERNS, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 07-15769 D.C. No. CV-04-01937-NVW MEMORANDUM* (Filed Jan. 28, 2009)

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted November 20, 2008
San Francisco, California

Before: CANBY and WARDLAW, Circuit Judges, and MILLS,** District Judge.

The United States of America appeals from the district court's judgment after a bench trial imposing liability under the Federal Tort Claims Act ("FTCA") for damages resulting from Scott Kerns's mistaken arrest and imprisonment. We have jurisdiction

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

pursuant to 28 U.S.C. § 1291. We review de novo the district court's legal conclusions and review for clear error its factual findings, *see Howard v. United States*, 181 F.3d 1064, 1066 (9th Cir. 1999), and we reverse.

The FTCA waives the United States' sovereign immunity for certain torts, but exempts any claim arising out of torts which include false arrest or false imprisonment. 28 U.S.C. § 2680(h). The statute contains an exception allowing claims arising out of false arrest or false imprisonment that involve "acts or omissions of investigative or law enforcement officers of the United States Government." *Id.* No evidence in the record establishes that the intelligence analyst defendants were "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," as required by section 2680(h). Accordingly, a plain reading of the statutory definition of "investigative or law enforcement officer" indicates that the intelligence analyst defendants are not such officers. Therefore, the district court correctly determined that a claim of false arrest and imprisonment based on the conduct of the intelligence analyst defendants is plainly foreclosed under section 2680(h).

We conclude that the district court erred in permitting Kerns to proceed on his alternative theory based on the Arizona tort of gross negligence by an investigator. We have specifically held that a plaintiff "cannot sidestep the FTCA's exclusion of false imprisonment claims by suing for the damage of false

imprisonment under the label of negligence," *Snow-Erlin v. United States*, 470 F.3d 804, 809 (9th Cir. 2006), as this "would permit evasion of the substance of § 2680(h)'s exclusion of liability," *id.* at 808 (alterations and internal quotation marks omitted). The gravamen of Kerns's claim is clearly the injury and damages resulting from his false arrest and imprisonment. Therefore, his claim is barred under section 2680(h) as arising out of a false arrest or false imprisonment. *Id.* at 809. Accordingly, we reverse the district court's judgment in favor of Kerns and remand for dismissal of this action for lack of subject matter jurisdiction.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott Curtis Kerns, Plaintiff, vs. United States of America, Defendant.	No. CV-04-01937-PHX-NVW **FINDINGS OF FACT AND CONCLUSIONS OF LAW** (Filed Feb. 21, 2007)

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Plaintiff Scott Curtis Kerns brings this action against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346,

for money damages for the wrongful arrest and detention caused by the officers and agents of a federal drug-enforcement task force. The court held a bench trial from December 12 through 14, 2006, on Plaintiff's claims for grossly negligent police investigation and false arrest and imprisonment. Plaintiff's claim of merely negligent investigation was dismissed at trial. Having considered the trial evidence and the arguments of counsel, the court enters the following Findings of Fact and Conclusions of Law.

I. Findings of Fact

A. Background

Sometime in 1999, the Drug Enforcement Agency ("DEA"), the United States Customs Service, and the Federal Bureau of Investigation ("FBI") joined with other state and local law enforcement members of the Southwest Border Alliance Task Force to investigate a drug importing crime syndicate operating in and around Yuma, Arizona. The DEA was the lead agency in what came to be known as "Operation Green Prickly Pear." The investigation, which came to a close on September 9, 2001, included but was not limited to surveillance, wiretaps, interviews, and undercover operations.

In the course of the investigation, an individual later identified as Scott Michael Kernes was overheard on at least three wiretap intercepts discussing issues relating to the drug trafficking conspiracy. However, the evidence gleaned from these

wiretap intercepts did not result in the arrest of Scott Michael Kernes. Instead, federal officers arrested Scott Curtis Kerns, a resident of Yuma and the Plaintiff in this matter. Plaintiff was mistakenly indicted by an Arizona grand jury on January 10, 2002, and apprehended by heavily armed federal agents outside his Yuma home on January 28, 2002. Although he did not know why he had been arrested, Plaintiff cooperated with the federal officers by, among other things, giving them the keys to his residence. Federal agents thoroughly searched Plaintiff's home for contraband but found nothing. The law enforcement officers scattered the contents of Plaintiff's drawers and cabinets in the course of their futile search for narcotics. Plaintiff was then transported to the Yuma National Guard Armory for questioning by federal agents, where he joined approximately 29 other alleged members of the drug trafficking conspiracy arrested that day. After questioning, Plaintiff was detained in the Yuma County Detention Facility and then transported at two in the morning on January 30, 2002, to the Maricopa County Madison Street Jail in Phoenix, Arizona.

Plaintiff Scott Curtis Kerns has no relationship to Scott Michael Kernes. Plaintiff did not utter the inculpatory statements overheard by members of the Task Force in the wiretap intercepts. From the moment of his arrest, Plaintiff explained that he was the victim of mistaken identity. At first his efforts were unavailing. Then, at the Maricopa County jail

on January 30, 2002, Plaintiff had a brief conversation with another arrestee, Shannon Pulda, whom he recognized from high school. Shannon was involved in the drug trafficking conspiracy along with Scott Michael Kernes, and because she happened to know both Scott Kernes and Scott Kerns, she was able to inform Plaintiff that he was "not the right Scott."

Plaintiff then called Cindy Kerns, who was his girlfriend at the time of his arrest and is now his wife, to tell her about the "other" Scott Kernes. Cindy confirmed the identity of Scott Michael Kernes by calling the bowling alley where he worked in Yuma. She then contacted the local DEA office to inform them of their mistaken arrest of Scott Curtis Kerns. Plaintiff also informed the Maricopa County Superior Court that there was "another Scott Kernes" living in Yuma during his initial court appearance on January 30, 2002. Billie Rosen, Operation Green Prickly Pear's lead prosecutor, was present at the hearing and was struck by Plaintiff's claim of mistaken identity. Ms. Rosen asked federal agents to investigate Plaintiff's story.

After reviewing the primary inculpatory data from the wiretap intercepts, federal agents confirmed that they had in fact arrested "the wrong Scott." Billie Rosen caused Plaintiff to be released from the Maricopa County jail and dismissed, with prejudice, from the narcotics conspiracy case on January 31, 2002, four days after his arrest.

B. The Misidentification of Scott Curtis Kerns

The investigation into the Yuma drug trafficking conspiracy was characterized as absolutely professional and extraordinarily good by Billie Rosen, the lead prosecutor. Indeed, the correct person was arrested in 96 of the 97 cases. But four intelligent analysts made grave errors in Plaintiff's case. By their acts and omissions, the Task Force analysts caused law enforcement officers to indict and arrest Scott Curtis Kerns rather than the wanted narcotics co-conspirator, Scott Michael Kernes. There was no objective or reliable evidence linking Plaintiff to the criminal conduct. The following findings explain how the analysts' investigation went wrong.

1. The Case Officers Relied Upon the Analysts

Special Agents Carl Geohegan and George Carter, from the FBI and the Customs Service respectively, were the case agents responsible for monitoring the wiretaps for information about the drug trafficking conspiracy. Geohegan and Carter intercepted over 30,000 phone calls during Operation Green Prickly Pear, working from early morning until midnight, seven days a week, for months at a time. In some cases, the operational surveillance officers intercepted as many as 1,500 calls per day. The numerous wiretap intercepts yielded a correspondingly large amount of data, consisting of captured telephone numbers and information relating to the

date, time, duration, and type (local, long-distance or cell phone) of each call. The case agents relied exclusively upon the four intelligence analysts to extract positive suspect identifications from these raw data. DEA agent Angeline Woolbright, who received formal investigative training from the FBI, was the Operation's lead analyst. The three other analysts came from the DEA (Cynthia Carlon-Canales), the U.S. Customs Service (Frank Gonzalez), and the Arizona National Guard (Bob Baldwin).

2. The Duties of the Intelligence Analysts: Suspect Identification

The four Task Force analysts were jointly responsible for researching the wiretap data and delivering the name of the person whose statements had been intercepted, along with other points of identification. The case agents relied exclusively upon the analysts' work product when seeking indictments and effecting arrests of the narcotics conspirators. There was no independent verification of the suspect identifications provided by the analysts. The analysts established a three-step procedure to identify each suspect. First, Agent Woolbright and her colleagues made an initial suspect identification by matching the telephone numbers captured by the wiretaps with subscriber information subpoenaed from telephone companies. They used a data management computer program to store the suspect's name and some other primary data extracted from the administrative subpoena returns. Second, the analysts used the

name provided by the telephone companies, and nothing else, to request a photograph and other file data from the Arizona Department of Motor Vehicles ("DMV") in Yuma, Arizona. Lastly, the analysts created a target folder summarizing the data delivered to them by the Yuma DMV and finally identifying the suspect. The analysts never confirmed the accuracy of their final suspect identification by reference to any of the primary data provided to them by the telephone companies at the first stage of the investigation. The federal case agents and Arizona prosecutors relied exclusively upon the suspect target folders assembled by the analysts for suspect identifications.

3. The Analysts' Independence

The analysts performed their duties independently. Although she was the lead analyst, Agent Woolbright did not exercise supervisory authority over her peers in the intelligence room. The four analysts shared investigative responsibilities equally amongst themselves. Furthermore, there were no procedural manuals or other written directives defining the analysts' responsibilities in Operation Green Prickly Pear. The analysts established and implemented their suspect identification policy without formal oversight. No single case officer was assigned to oversee the analysts. Instead, each analyst reported directly to his or her supervisor at the DEA, the National Guard, or the U.S. Customs Service, respectively.

Three federal intelligence analysts and only one state analyst were assigned to Operation Green Prickly Pear. The three-to-one ratio of federal to state analysts makes it more likely than not that one of the federal analysts was responsible for each act and omission leading to Plaintiff's arrest and detention. Moreover, the DEA, the U.S. Customs Service, and the Arizona National Guard analysts were jointly responsible for providing suspect identifications to the case agents, rendering each sovereign responsible for the actions and omissions of the analyst team. Each step of the analysts' suspect identification procedure is analyzed below as it was applied to Plaintiff.

4. Step One: Initial Suspect Identification by Administrative Subpoena

i. Requesting Subscriber Information

The analysts began each investigation by seeking the subscriber identity for the phone used to initiate or receive each intercepted telephone call. The analysts sent administrative subpoenas to various telephone companies to obtain this information. Throughout the course of the Operation, Agent Woolbright and her fellow analysts prepared four to five hundred such subpoenas, with each subpoena containing requests for subscriber information on 15 to 20 phone numbers. The telephone companies responded by faxing the requested information to the intelligence room. The amount of subscriber data

actually produced varied by telephone company. The analysts relied entirely upon the administrative subpoenas, which formed the only link between the intercepted criminal activity and the suspect.

In Plaintiff's case, intelligence analyst Cynthia Carlon-Canales and Special Agent Chris Woolbright (a different person from analyst Angeline Woolbright), both of the DEA, sent an administrative subpoena on June 11, 2001, requesting subscriber information for intercepted cell phone number (520) 580-8248. (Pl. Ex. 3.) MCI WorldCom responded to the subpoena on June 13, 2001, providing detailed and correct information about Scott Kernes, the cell phone subscriber. The subpoena return included six identifying data points for Scott Kernes: 1) name, 2) home address, 3) work, home and cell phone numbers, 4) Social Security number, 5) Arizona driver's license number, and 6) date of birth. (*Id.*)

ii. Entering the Identifying Data into the Pen Link Database

Upon receipt of the subpoena return, the Task Force analysts entered some of the identifying information contained therein into a DEA database called "Pen Link." Pen Link is a commercially available data management tool that the intelligence analysts used to collect and sort wiretap information. Angeline Woolbright and the other three analysts received training on how to enter telephone data from the subpoena returns into the Pen Link database.

The Pen Link program featured multiple tabs containing data fields for a range of information. The first tab contained fields for first, middle, and last names, phone number, address, and source of the subscriber information. Additional tabs contained fields for more specific identifying data such as known aliases, associates, bank accounts, vehicles, and unique identifiers such as driver's license numbers, FBI numbers, Social Security numbers, dates of birth, height, weight, and physical descriptions.

Many of the Pen Link data fields could be completed on the basis of information provided by the telephone companies in the subpoena returns. In general, however, the analysts only completed the data fields located on the first tab of the Pen Link program, which included the suspect's name, phone number, address, and the name of the telephone company that provided the subscriber information. According to Agent Woolbright, the analysts did not have sufficient time to click on the second tab and complete the fields for date of birth, Social Security number, and other uniquely identifying data points for each suspect. Although readily available to the analysts from the subpoena returns, the large amount of data to be processed each day prevented the analysts from inputting unique identifiers into Pen Link. The court accepts this testimony as to the telephone intercepts in general.

Following standard analyst procedure, at some point between June 13, 2001, and July 17, 2001, one

of the analysts retrieved the subpoena return from MCI WorldCom for Scott Kernes and entered the identifying data contained therein into the first tab of the Pen Link database. However, the analyst mistakenly typed the name "Scott Kerns" into the Pen Link database while entering the remainder of Scott Kernes' subscriber information into the first tab of the data management program. This clerical error is illustrated by the Pen Link data report dated November 16, 2001, showing the incorrect name "Kerns, Scott" next to Scott Kernes' true address, 533 19th Avenue, Yuma, Arizona. (Def. Ex. 21.) This error was compounded by the analysts' policy of not entering any additional identifying information beyond the suspect's name, phone number, and address into Pen Link. Although the analysts conceived of Pen Link as an "evolving database," which could be updated and changed as additional information about a particular suspect was uncovered, Scott Kernes' Social Security number, Arizona driver's license number, and date of birth were never entered into the program, and the misspelling of his name was never corrected.

iii. Storing the Subpoena Return

After inputting the limited subscriber data from the subpoena return into Pen Link, the analysts placed the telephone company records in a four-drawer filing cabinet located in a central file room down the hall from the intelligence room. The subpoena returns were filed in chronological order

according to the date received. Twenty to thirty minutes were required to retrieve the telephone records for a particular suspect from the subpoena return file room. However, later subpoena return retrieval formed no part of the analysts' investigative procedure. The analysts made their initial suspect identification by subpoena return and selective Pen Link data entry. From that point on, the Pen Link database was assumed to be a reliable proxy for the telephone records it incompletely summarized. The analysts, citing time constraints, made no attempt at any point in the investigation to check the data contained in the computer program against the underlying inculpatory data in the subpoena return. The subpoena return was the only link between the criminal conduct observed and the person indicted for that conduct.

Scott Michael Kernes' subpoena return was treated like all of the others. His telephone records were stored in the file room after one of the analysts mistyped his name as "Scott Kerns," but accurately completed the balance of the data fields contained in the first tab of Pen Link. The subpoena return plainly inculpating Scott Michael Kernes and exculpating Plaintiff was not retrieved or reviewed until Billie Rosen asked federal agents to investigate the possibility of Plaintiff's mistaken arrest on January 30, 2002.

iv. The Limited Role of the Pen Link Database and the Primary Role of the Target Folder

The analysts' failure to complete any data fields beyond those contained in the first tab of Pen Link is consistent with the limited role of that database in Operation Green Prickly Pear. Pen Link was used exclusively by the analysts. Agent Woolbright and her colleagues used the database to manage the large volume of telephone data provided by the case agents, and to extract initial investigative leads from the raw data. For example, they used Pen Link to generate "frequency reports," which gave the analysts information about the total number of times that a given number was called during a specified date range. (Def. Ex. 21.) Most importantly, the analysts used the suspect name stored in Pen Link to request additional identifying data from the Arizona Department of Motor Vehicles, as will be discussed below.

Pen Link was not a case management system. The database was not designed to store the information that would be used to seek suspect indictments and prosecutions. This was the function of the "target folder," which was a paper folder containing the results of the analysts' investigation. The target folder contained a summary of the identifying data retrieved from the Arizona DMV, other documents derived from the records of the Motor Vehicles Department, criminal history records, vehicle registrations, and commercially available credit reports. Significantly, the analysts chose not to place

a copy of the administrative subpoena return in the target folder. The subpoena return data summarized in Pen Link were also excluded. As a result, Special Agent Carter used entirely secondary information, not primary telephone data, to indict and apprehend each alleged member of the drug trafficking conspiracy.

5. Step Two: Retrieving Information from the Department of Motor Vehicles by Name Alone

The intelligence analysts used the information stored in the Pen Link database to obtain further data on the identity of the suspected drug traffickers from the Arizona Department of Motor Vehicles. The initial reason given for seeking driver's license files was to obtain a photograph so that the agents could recognize their suspects. The analysts prepared hand-written lists of suspect names from the Pen Link database, and then gave these lists to Arizona Department of Safety Officer Brian Turner. Officer Turner used the names provided by the intelligence analysts to obtain a printout of each suspect's Arizona driver's license record, which included the person's full name, driver's license number, date of birth, home address, sex, eye color, height and weight, along with a color photograph of the suspect stored on a computer disc. (Pl.Ex.6.)

In Plaintiff's case, one of the intelligence analysts provided the name "Scott Kerns," without

more, to Arizona Department of Safety Officer Turner on July 17, 2001. Whenever time permitted, Agent Woolbright included a unique identifier in addition to a name when making requests to the DMV. But this was not standard analyst procedure, and it did not occur in this case. Plaintiff's mistaken arrest and prolonged detention became recklessly probable when the analyst failed to include in the request for controlling identifying information for "Scott Kerns" the suspect's Social Security number or Arizona driver's license number, and failed to compare the DMV return to the telephone subpoena return. Mr. D.P. Van Blaricom, a credible expert in police investigative practices, testified that misidentification is likely when a positive suspect identification is sought in the absence of at least one unique identifier. If a unique identifier had been provided to Officer Turner, he would have retrieved the correct suspect's records from the DMV, notwithstanding the fact that he was given the incorrect name, "Scott Kerns." But this is not what happened.

Agent Woolbright urged a different interpretation of the facts at trial. She contended that the name "Scott Kernes" was entered correctly into Pen Link at the outset of the investigation. She further contended that her team was thrown off by a Department of Motor Vehicles employee who mistakenly retrieved Arizona driver's license records for Plaintiff rather than for Scott Michael Kernes. Believing this information to be correct, she inferred that one of the analysts later replaced the name "Scott Kernes" in

the Pen Link database with "Scott Kerns," but did not change the suspect's address to conform with the data retrieved from the Yuma DMV.

The Government could not reconstruct the Pen Link database for Operation Green Prickly Pear. Precisely when the name "Scott Kerns" was entered into the computer program remains uncertain. However, it is improbable that the error was committed by a DMV employee researching the name "Scott Kernes," as that name would have yielded the true suspect. It is also improbable that the analysts would have taken the time to change the spelling of the name in Pen Link upon receipt of the wrong driver's license record, yet leave the address field unmodified. It is more likely that the name was misspelled in the analysts' request to the DMV. Applying the maxim that the simplest explanation for an event is more likely the correct explanation, it is more likely than not that the data entry error was committed by the intelligence analysts at the first stage of the investigation when they confronted a large number of suspects and were working under time pressure as well.

6. Step Three: Creating the Target Folder Without Considering the Subpoena Return

i. Summarizing the DMV Data

Following her standard procedure, Angeline Woolbright created a Microsoft Word document

summarizing Scott Curtis Kerns' driver's license records sometime between July 17, 2001, and July 27, 2001. The document contained a computer image of Plaintiff, along with his date of birth and driver's license number. (Def. Ex. 24.) The analyst printed the Word document, affixed one copy to the wall of the wire room for use by operational surveillance officers, and placed another copy in the Scott Kerns target folder. The stated purpose for seeking the DMV records was just to obtain a suspect photograph. Yet the driver's license data were the only identifying data included in the suspect folder, and the only data the analysts ever again considered. Though there was no plan for doing so, in effect the Task Force analysts completely ousted the persona from the telephone subpoena return for the persona on the driver's license. This ouster caused Special Agent Carter to testify before the Arizona grand jury seeking Plaintiff's indictment.

ii. Additional Information Derived from the DMV: DEA Form-202

A Personal History Report (DEA Form-202) was generated for Plaintiff, rather than for the actual suspect, on August 29, 2001. (Def. Ex. 18.) This document contained detailed identifying information for Scott Curtis Kerns, all of which was retrieved from the Yuma DMV by the intelligence analysts on August 29, 2001. The Form-202 was placed on top of Plaintiff's DMV summary and the other identifying

information contained in the Scott Kerns target folder.

iii. The Failure to Consult the Subpoena Return for Identification

The mistaken identity retrieved from the Yuma DMV was never checked against the primary telephone company data summarized in Pen Link or the subpoena return stored in hard copy in the file room. Having solicited unique data from the telephone company at the first stage of the investigation, the analysts made their final suspect identification based only upon a name, and a misspelled one. A name alone is an inherently unreliable point of identification, as Mr. Van Blaricom credibly testified, and reliance on a name alone for indictment and arrest is grossly unjustifiable when unique identifiers, such as a Social Security number or a driver's license number, are at hand.

Even accepting the analysts' contention that time constraints precluded them from spending the 20 to 30 minutes required to retrieve the telephone company records from the file room in every case, their exclusive reliance upon DMV identities based on a name alone was grossly negligent in the case of actual indictments obtained in non-exigent circumstances. The large amount of data to be processed each day restricted the volume of information that the analysts copied from the subpoena return into Pen Link. But even so, the analysts themselves

believed that some quantum of data beyond a suspect's name was necessary. Otherwise they would not have taken the time to enter Scott Kernes' true address – 533 19th Avenue, Yuma, Arizona – into Pen Link. Yet Plaintiff's home address – [Home Address Omitted] – supplanted that address without further inquiry. The DMV records in the target folder could be checked against the Pen Link data for a particular suspect in just five to ten minutes. Special Agent Carter testified that it was inconceivable to him that such a check had not been performed by his analysts at some point prior to his testimony to the grand jury on the identity the analysts provided to him. Yet no check was ever performed.

There were no exigent circumstances, or any time constraints whatsoever, that might explain the analysts' failure to consult the primary identifying data already in their possession before seeking indictment. Plaintiff's target folder was complete as of August 29, 2001, the date the Personal History Report (DEA Form-202) was generated. Special Agent Carter appeared before the Arizona grand jury to seek Plaintiff's indictment on January 10, 2002. The analysts spent the intervening four months in painstaking data analysis, working alongside the case agents and Arizona prosecutor Billie Rosen to winnow the large number of potential suspects down to the 97 individuals indicted.

7. Angeline Woolbright's Explanation

The analysts in this case were not conscious of the differences – in name as in everything else – between the subpoena return and the driver's license precisely because they never looked back to the Pen Link database or the telephone records. Even if they had been conscious of such differences, the apparent effect of Angeline Woolbright's testimony was that she and her fellow analysts would have looked no further, would have assumed that the identifying data provided by the Motor Vehicles Department were always correct, and would have sought indictment of the person on the driver's license. According to her, the records from the Yuma DMV were believed to be more reliable than those provided by the telephone companies in the subpoena returns, making a cross-check against the primary data unnecessary. If this was the intent of her testimony, the court is not persuaded by it. That the analysts believed DMV identifications were always correct and that they declined to compare DMV identifications against primary inculpatory identifications already in their possession out of confidence in DMV infallibility is refuted by Agent Woolbright's own experience.

In support of her view, analyst Woolbright testified that, of the 200 to 300 DMV records retrieved over the course of Operation Green Prickly Pear, minor differences between the spelling of the name in the subpoena return as entered into Pen Link and the name provided by the Yuma DMV were discovered approximately 20 to 30 percent of the

time. Many suspects changed the spelling of their names when registering for cell phone services in an attempt to mislead law enforcement officers. A one letter difference between the name on a driver's license and the name of the cell phone subscriber would not cue her to check the two data sources for other identifiers; the DMV identity always prevailed, without inquiry. Out of the many investigations that Agent Woolbright handled, and in her experience as a DEA analyst getting returns back not just in this case but in many others, it was very rare for a minor spelling inconsistency in a suspect's name to generate data sets for two different people. Without doubting the correctness of this specific testimony, it is plainly irrelevant to the facts of this case, where every single datum on the driver's license was different from the corresponding datum in the subpoena return.

Agent Woolbright's assumption of universally correct identities from the driver's license data, so as to excuse consideration of the more direct identifying data at hand, was disproved by her own experience. In one other instance, she provided a name to the Yuma DMV and a completely different name came back to the intelligence room. This apparently led her to retrieve the suspect's subpoena return from the file room, which showed the driver's license to be of a different person.

The court therefore finds that the analysts' ouster, without consideration, of the Pen Link data and the subpoena return in favor of the driver's license identification was not grounded in belief in

the universal correctness of the DMV identifications. The failure to compare the derivative identifying data with the primary identifying data, resulting in *de facto* abandonment of the primary identifying data, was done without reflection. If the analysts had weighed the benefit and the effort of checking the primary identifying data – and the court finds that they did not – they might have thought that the primary data would almost always confirm the DMV identification, making the risk of misidentification acceptably low. But the fact that the correct patient is almost always wheeled into the operating room does not make it anything less than gross negligence for a surgical team to decide not to read the name on the patient's wrist band before making the first incision.

8. Standards of Police Practice

As testified to by Mr. Van Blaricom, standard police investigative practices were violated when the analysts solicited an identification from the Department of Motor Vehicles on the basis of a suspect's name alone, and then failed to check the identity against the unique identifying data already in their possession. As a result, Plaintiff was indicted and arrested on the basis of a mistaken name alone, without consideration of the conclusively exculpatory data that the analysts had subpoenaed, retained, and could have reviewed with five to thirty minutes of effort. The same confirmation for all 97 persons indicted could have been performed in eight to 49

hours, a trivial expenditure in light of the scope of Operation Green Prickly Pear.

C. Damages

Plaintiff was profoundly affected by his arrest and detention. He was not able to return to his home for eight months after his release from the Maricopa County Jail, choosing to live instead at the home of Cindy Kerns, his girlfriend at the time. Plaintiff rarely if ever left Cindy's home during those eight months. He stayed indoors with the blinds closed, refusing to answer the phone, watching television, and keeping his distance from his family and friends. Plaintiff remained troubled even after returning to his home. Plaintiff decided to seek medical attention in 2004 when his psychological trauma manifested itself physically in the form of severe migraine headaches. On January 16, 2004, he began receiving psychotherapy for post-traumatic stress disorder ("PTSD") from Nada Cox, a licensed clinical social worker who diagnosed his condition. Plaintiff's PTSD is a permanent condition that was triggered by the events of January 28, 2002, through January 31, 2002. Ms. Cox's treatment, which continued until May 30, 2006, was designed to help Plaintiff cope with the enduring physical and psychological ramifications of his mistaken arrest and detention. Plaintiff continues to have difficulties sleeping, communicating with his wife, children, and extended family, and interacting with his friends.

Plaintiff's reputation was also harmed by his arrest and detention. Yuma is a small community, and many of Plaintiff's friends heard about his arrest by word of mouth. Plaintiff's name also appeared on the front page of the local newspaper, the Yuma Sun, under the heading "Busted." His picture was displayed on the local television news shortly after his arrest. Plaintiff's social dysfunction, which manifested itself only after his release from the Phoenix jail on January 31, 2002, is directly related to the stigma that attached to his arrest and detention.

Plaintiff's damages are $180,000.00 for emotional harm and $20,000.00 for reputational harm, for a total of $200,000.00. Plaintiff does not claim damages for lost wages, and no damages will be awarded on that basis.

II. Conclusions of Law

The Federal Tort Claims Act is a limited waiver of the United States' traditional sovereign immunity, authorizing certain tort suits against the Government for monetary damages. 28 U.S.C. § 1346(b). Under the FTCA, the United States may be liable for the acts or omissions of a federal employee acting within the scope of his office only if a private person would be liable for the same acts or omissions under "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *United States v. Olson*, 126 S. Ct. 510, 511 (2006). The acts and omissions of the federal officers and agents in this case occurred in

Arizona. Accordingly, Plaintiff may recover only if he could hold them personally liable for grossly negligent investigation and/or false arrest and imprisonment under Arizona law on the facts set forth above.

A. Grossly Negligent Police Investigation

The existence of a cause of action for grossly negligent police investigation under Arizona law is disputed. This court "must apply what [it finds] to be the state law after giving proper regard to relevant rulings of other courts of the State." *Comm'r v. Estate of Bosch,* 387 U.S. 456, 465 (1967) (internal quotations and citation omitted). Upon consideration of the applicable statutory and common law, the court finds that the Arizona Supreme Court would recognize a cause of action for grossly negligent police investigation on the facts of this case.

1. The Statutory Law of Qualified Immunity in Arizona

The Arizona legislature cloaked Arizona public employees acting within the scope of their employment with qualified immunity for the commission of the specific acts or omissions enumerated at A.R.S. § 12-820.02(A). If the public employee's action or inaction comes within this statutory safe harbor, he may be liable personally only if he "intended to cause injury or was grossly negligent." A.R.S. § 12-820.02(A). The statute does not expressly grant that

limited immunity to state law enforcement officers who conduct police investigations that lead to the arrest and detention of an innocent person.

The Arizona Revised Statutes subsequently provide that the legislative grant of qualified immunity at A.R.S. § 12-820.02(A) should not be construed to "affect, alter or otherwise modify any other rule[] of tort immunity regarding . . . public officers as developed at common law." A.R.S. § 12-820.05. Because the Arizona legislature has not stated when personal liability attaches in police investigations, the court must look to Arizona decisional law.

2. The Arizona Common Law Landscape

In *Cullison v. City of Peoria,* 120 Ariz. 165, 584 P.2d 1156 (1978), the Arizona Supreme Court determined that state law enforcement officers may be personally liable for the grossly negligent prosecution of police investigations. To survive a motion for summary judgment, the plaintiff in *Cullison* was required to show "that the conduct of the police was outside the duty and standard of care required of them in that they had reason to believe that the information on which they based their arrest . . . was not trustworthy." *Id.* at 167, 584 P.2d at 1158. The plaintiff's allegation of gross negligence, which turned exclusively on "hearsay, speculation and opinion" impugning the reasonableness of the

arresting officer's reliance upon an eyewitness identification, did not meet this exacting standard. *Id.* at 167, 584 P.2d at 1158. The police offer [sic] was not personally liable for detaining the wrong person because he had probable cause to effect the plaintiff's arrest. The court suggested that a "flagrant violation" of rights guaranteed by the federal and state constitutions, or by the Arizona Rules of Criminal Procedure, was required for a claim of grossly negligent police investigation to lie. *Id.* at 169, 584 P.2d at 1160. The 1978 decision of the Arizona Supreme Court in *Cullison* stands unaffected by the subsequent enactment of A.R. S. § 12-820.02(A) in 1984. A.R.S. § 12-820.05; *see Guillory v. Greenlee County*, 2006 WL 2816600 (D.Ariz. 2006) (adjudicating plaintiff's cause of action for grossly negligent police investigation under Arizona law); *Winfrey v. City of Gilbert*, 2006 WL 1602462 (D.Ariz. 2006) (same).

In *Landeros v. City of Tucson*, 171 Ariz. 474, 831 P.2d 850 (Ct. App. 1992), the Arizona Court of Appeals had occasion to apply *Cullison's* holding to a different set of facts. In that case, a police detective obtained a grand jury indictment and arrested an innocent person based on an interview with a juvenile claiming to have personal knowledge of the crime. The arrestee was released from custody when the juvenile's testimony was later discredited. The wrongfully arrested individual sued the arresting officer for grossly negligent investigation of a crime resulting in an arrest. Acknowledging that *Cullison* appeared to

grant a remedy in tort, the court nevertheless concluded that the plaintiff had not met the demanding standard of gross negligence previously established by the Arizona Supreme Court. The *Landeros* court also concluded that "the public interest mandates a rejection" of a tort law remedy for "simple negligence" in police investigations. *Id.* at 475, 831 P.2d at 851. The court elaborated by noting:

> The public has a vital stake in the active investigation and prosecution of crime. Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. The judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence.

Id. at 475, 831 P.2d 851 (internal quotation omitted).

3. Elements of the Tort of Grossly Negligent Police Investigation

To prove ordinary negligence under Arizona law, Plaintiff must establish that he was owed a duty, that the duty was breached, and that his injuries were proximately caused by that breach. *Morris v. Ortiz*, 103 Ariz. 119, 437 P.2d 652 (1968). "Gross negligence differs from ordinary negligence in quality and not degree." *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1218 (Ct. App. 1991) (internal citation omitted). In *Cullison*, the Arizona Supreme Court described gross negligence as "highly

potent, and when it is present it fairly proclaims itself in no uncertain terms. It is 'in the air,' so to speak. It is flagrant and evinces a lawless and destructive spirit." 120 Ariz. at 169; 584 P.2d at 1160 (citations omitted).

4. Gross Negligence in the Investigation Leading to the Arrest and Detention of Scott Curtis Kerns

i. Duty Owed by the Intelligence Analysts to Consider the Direct Evidence at Hand when Identifying Suspects

The standard of care for police identification was articulated at trial by D.P. Van Blaricom, a credible and impressive expert in police investigative practices. Law enforcement officers must at least consider the evidence at hand in identifying suspects in police investigations. "Any competent police officer is aware of the grave consequences that flow from a misidentification of the wrong person as the perpetrator of the offense." *Schneider v. Simonini,* 749 A.2d 336, 367 (N.J. 2000). Like police officers, the intelligence analysts responsible for identifying the suspects in Operation Green Prickly Pear are charged with a duty to take precautions against arresting an innocent person. *See Simmons v. United States,* 390 U.S. 377, 384 (1968) (requiring reasonably accurate initial identification procedures to spare "innocent suspects the ignominy of arrest").

Unique identifiers such as a driver's license or Social Security number are commonly used to provide positive suspect identification in police investigations, and they are especially useful in wiretap investigations. An innocent person is more likely to be misidentified in a wiretap investigation than in other police investigations. As Mr. Van Blaricom explained at trial, wiretap investigations begin solely on the basis of a person's disembodied voice and, perhaps, the phone numbers of the individuals making and receiving the intercepted call. This is different from a typical police investigation in which eye witnesses or other sources of ready identification are available.

ii. The Grossly Negligent Breach of the Standard of Care

The analysts are not personally liable under Arizona law for their merely negligent misspelling of Scott Kernes' name in Pen Link and in their request for Arizona driver's license data solely on the basis of that misspelled name. However, gross negligence occurred at the third and final stage of the analysts' investigation into the identity of the subscriber for cell phone number (520) 580-8248. The analysts were recklessly indifferent when they failed to compare the identity of "Scott Curtis Kerns" as listed in the target folder against the primary data incompletely summarized in the Pen Link database. Even the most cursory check between the two data sets, which could have been performed in just five to ten minutes, would have revealed the discrepancy between the

home address for Scott Kerns provided by the Yuma DMV, 12706 South Avenue B, Yuma, Arizona, and the subpoena-derived address for Scott Kernes in the Pen Link database, 533 19th Avenue, Yuma, Arizona. That review would have led the analysts back to the subpoena return with its multiple unique identifiers conclusively exculpating Plaintiff and inculpating Scott Kernes. The court, like Special Agent Carter, finds the analysts' failure to act inconceivable.

The analysts knew that Special Agent Carter would rely upon the identifying information contained in the target folder when appearing before the grand jury and when arresting the suspect at the address of record. As law enforcement professionals, the analysts had a duty at least to consider the conclusive evidence actually in their possession. Nevertheless, the analysts never even consulted the primary identifying data that they deemed important enough to subpoena and summarize in the Pen Link database.

The court once more notes the total absence of exigent circumstances at the third and final stage of the analysts' investigation. As discussed above, Plaintiff's target folder was complete as of August 29, 2001, and operational surveillance was terminated for all suspects on September 9, 2001. From September 2001, until the middle of January 2002, the Task Force analysts and their colleagues methodically reviewed the available evidence for all their suspects. Agent Woolbright and the other three analysts had an abundance of time to check the

address data previously solicited from MCI WorldCom and summarized by them in Pen Link against the plainly inconsistent data provided by the Arizona Department of Motor Vehicles. Yet no check was ever performed.

iii. No Probable Cause to Arrest Plaintiff

Under Arizona law, probable cause is a complete defense to the tort of grossly negligent police investigation. *Cullison,* 120 Ariz. at 167, 584 P.2d at 1158. Recovery under *Cullison* requires a showing that the "conduct of the police was outside the duty and standard of care required of them in that they had reason to believe that the information on which they based their arrest [the derivative DMV data], was not trustworthy." *Id.* As the Arizona Supreme Court recognized in *Cullison,* this inquiry is informed by the United States Constitution. *Id.* at 168; 584 P.2d at 1159.

It is axiomatic that a police officer must have probable cause before effecting an arrest. *See Brinegar v. United States,* 388 U.S. 160 (1949). Probable cause requires a showing, to a reasonable degree of certainty, not only that a crime has been committed, but also that the person sought to be arrested actually committed the offense. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979). Probable cause exists where "facts and circumstances within the officers' knowledge and of which they had reasonably

trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been committed by the person under inquiry. *Brinegar,* 338 U.S. at 175-76 (citation and internal quotations omitted); *see Illinois v. Gates,* 462 U.S. 213, 231 (1983) (prescribing a "totality-of-the-circumstances" approach directed to the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (citation and internal quotations omitted). Probable cause is evaluated in light of the collective knowledge of the law enforcement agency rather than the knowledge of a particular agent. *United States v. Rosario,* 543 F.2d 6, 8 (2d Cir. 1976).

In this case, there is no dispute as to the existence of conclusively exculpating information in the possession of the Task Force analysts at the time of Plaintiff's indictment and arrest. It is also undisputed that the analysts failed to consider the exculpatory data during the four months dedicated to that task. As discussed above, a five to ten minute check between Plaintiff's target folder and the Pen Link database would have revealed the critical discrepancy between the home addresses contained therein. That review in turn necessarily would have led back to the subpoena return with its multiple unique identifiers proving Plaintiff's innocence. The identity of the actual suspect was reasonably ascertainable by the analysts at the time of Plaintiff's mistaken arrest. It follows that the available evidence was insufficient to justify a man of reasonable caution

in believing Plaintiff was the wanted narcotics co-conspirator. Therefore, probable cause did not exist, as a matter of law, for Plaintiff's arrest. *Watzek v. Walker,* 14 Ariz.App. 545, 548, 485 P.2d 3, 6 (Ct. App. 1971) (Arizona police officer did not have probable cause to arrest plaintiff when that officer failed to positively identify the suspect in violation of standard police investigatory practice); *Schneider,* 749 A.2d at 336 (in action arising under 42 U.S.C. § 1983, New Jersey court held that probable cause to arrest person innocent of charged offense did not exist when the police officer identified the alleged suspect solely on the basis of a search of a DMV database using only the suspect's name and information provided by an informant relating to the suspect's physical appearance, likely place of residence, and criminal history); *cf. Dirienzo v. United States,* 690 F. Supp. 1149 (D.Conn. 1988) (federal agents had probable cause to arrest plaintiff based on eye-witness identifications and other reasonably trustworthy information, which later turned out to be false).

iv. Causation

The United States contends that the grand jury's independent determination of probable cause on January 10, 2002, shields the analysts from liability for their conduct prior to that date. (Doc. # 61 at 14-15.) While the "chain of causation" might be broken by a grand jury indictment on other facts, *Smiddy v. Varney,* 665 F.2d 261, 266-67 (9th Cir. 1981), the

presumption of independent prosecutorial judgment is of little moment here.

An Arizona grand jury indictment is "nothing more than an expression of the opinion of at least nine people as to the credibility of evidence presented to it by the prosecutor." *Reams v. City of Tucson,* 145 Ariz. 340, 343-44, 701 P.2d 598, 601-02 (Ct. App. 1985). The prosecutor need not provide the grand jury with all the exculpatory evidence available to her. Grand juries are not "in the business of holding minitrials"; their "primary function" is "determining whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it." *State v. Baumann,* 125 Ariz. 404, 408, 610 P.2d 38, 43 (1980).

In Plaintiff's case, however, prosecutor Billie Rosen did not present the grand jury with any exculpatory evidence because she had no such evidence available to her. The prosecutor relied upon Special Agent Carter to provide the link between the intercepted criminal conduct and the person charged for that conduct. Special Agent Carter furnished the name of the suspect conclusively identified by the four intelligence analysts without reference to the primary inculpatory data. Considering all the evidence before them, including the plainly exculpatory evidence readily at hand, the analysts did not have probable cause to identify Plaintiff as the wanted narcotics co-conspirator. But they did provide his name to Special Agent Carter anyway. The grand jurors deliberated upon the inaccurate secondary

evidence presented to them and indicted the wrong person.

The grossly negligent conduct that occurred at the third stage of the analysts' investigation was the proximate cause of Plaintiff's mistaken indictment on January 10, 2002. The Arizona Supreme Court has not considered whether law enforcement officers may be personally liable under these circumstances. However, the Supreme Court most likely would not shelter the analysts from liability behind a facially valid grand jury indictment that their gross negligence brought about.

As the United States Supreme Court has recognized, "tort liability makes a man responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 334, 345 n.7 (1986) (intervening decision of a state judge to issue warrants for plaintiffs' arrest had no effect on law enforcement officer's potential liability under 42 U.S.C. § 1983 for effecting arrest of innocent persons without probable cause). The analysts' grossly negligent preparation of the Scott Kerns target folder and failure to consult either the Pen Link database or the subpoena return are the functional equivalents of a "reckless omission or fabrication of material information in [a warrant] application," which would "invalidate the warrant and generate tort liability for the subsequent arrest." *Dirienzo*, 690 F. Supp. at 1154. *Flores v. Dalman*, 199 Mich. App. 296, 502 N.W.2d 725 (1993), is to the same effect. In that case, a police officer who took no part in effecting the plaintiff's arrest was nevertheless found

liable in tort for informing the officer who actually obtained the arrest warrant that plaintiff was the wanted suspect, even though he had abundant information to the contrary in his possession. Affirming a jury award, the *Flores* court held that a "police officer is not shielded from liability by warrant where, because of the officer's failure to investigate or disclose exculpatory information, probable cause for the issuance of the warrant may have been lacking." 199 Mich. App. at 404, 502 N.W.2d at 729; *Osborne v. Rose,* 954 F. Supp. 1142, 1148 (W.D.Va.1997), *rev'd in part., mem.,* 133 F.3d 916 (4th Cir. 1998) ("An officer who, in support of a warrant application, submits an affidavit with a reckless disregard for the truth or with statements known to be false, may be held liable for a resulting false arrest despite the issuance of a facially valid warrant.").

Because the decision by Arizona prosecutor Billie Rosen to charge Plaintiff with the crimes actually committed by Scott Michael Kernes was made on the basis of the analysts' reckless identification alone, the causal link between the analysts' gross negligence and Plaintiff's arrest was not broken by the intervening grand jury indictment and issuance of a facially valid arrest warrant.

v. Damages

The analysts' failure to check their final suspect identification against any primary data was the cause-in-fact and the legal cause of the psychological

and reputational injuries for which Plaintiff now demands compensation.

B. False Arrest and False Imprisonment: The Intentional Tort Exception to the Federal Tort Claims Act

Plaintiff asserts an alternative theory of liability for false arrest and imprisonment. The United States is amenable to suit for these torts under 28 U.S.C. § 2680(h). However, Plaintiff has not carried his burden of establishing that the false arrest proviso applies to the intelligence analysts who proximately caused his mistaken arrest. This claim must therefore be rejected.

Congress amended the Federal Tort Claims Act in 1974 to provide a remedy against the United States where law enforcement officers commit intentional torts while acting within the scope of their employment or under color of federal law. S. Rep. No. 588, 93d Cong. 2d Sess. 2-3 (1974) (noting that Congress was motivated by several incidents in which federal narcotics agents engaged in "no-knock" raids in violation of the Fourth Amendment); *Wright v. United States*, 719 F.2d 1032, 1036 (9th Cir. 1983) (analyzing legislative history). The "intentional tort exception" adopted by Congress retains the immunity of the United States in cases involving:

> any claim arising out of . . . false imprisonment [or] false arrest . . . *provided*, that with regard to acts or omissions of investigative or

> law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of false imprisonment [or] false arrest.

28 U.S.C. § 2680(h).

The statute defines an investigative or law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h); *Arnsberg v. United States,* 757 F.2d 971, 977 (9th Cir. 1984) (placing the burden on the plaintiff to satisfy the statutory prerequisite to intentional tort liability). Plaintiff has assumed, without explanation, that the analysts satisfy the threshold requirement throughout the course of this action. He has submitted no issue in his pleadings, in the joint pre-trial statement that superseded the pleadings, or evidence at trial as to whether the intelligence analysts are "empowered . . . to seize evidence," or are otherwise "investigative or law enforcement officers" for purposes of the Federal Tort Claims Act. The court inquired about the applicability of section 2680(h) to the intelligence analysts during closing arguments on December 14, 2006. Counsel acknowledged that the issue had not been presented.

As the *Arnsberg* decision makes clear, the United States may be liable under section 2680(h) only if its investigative or law enforcement *officers* committed the false imprisonment or false arrest. The court

cannot guess as to whether the federal analysts meet this threshold definition. Because Plaintiff has not carried his burden under this section of the FTCA, his alternative theory of liability must be rejected.

C. The Discretionary Function Exception

As set forth above, the general waiver by the United States in the Federal Tort Claims Act of its sovereign immunity is subject to certain exceptions enumerated in 28 U.S.C. § 2680. The most far-reaching of these is the "discretionary function exception," 28 U.S.C. § 2680(a). This section retains the United States' immunity from suit as to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the discretionary function exception applies, "sovereign immunity is not waived, and no subject matter jurisdiction exists." *Gen. Dynamics Corp. v. United States,* 139 F.3d 1280, 1283 (9th Cir. 1998). Therefore, Plaintiff must "clear the discretionary function hurdle" in order to maintain his action for grossly negligent police investigation under 28 U.S.C. § 1346(b)(1). *Gasho v. United States,* 39 F.3d 1420, 1432 (9th Cir. 1994). While Plaintiff bears the initial burden of proving subject matter jurisdiction under the FTCA, it should be noted that "the United States bears the ultimate

burden of proving the applicability of the discretionary function exception." *Sabow,* 93 F.3d at 1451; *Vickers v. United States,* 228 F.3d 944, 950 (9th Cir. 2000) (same).

1. Legislative Intent

Whether the discretionary function exception applies in this case turns on the purposes the statute was designed to serve. The reported cases and commentary under the FTCA establish that Congress enacted section 2680(a) to prevent its limited waiver of sovereign immunity from impeding the pursuit of government policy-making. "The purpose of the discretionary function exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Gaubert,* 499 U.S. 315, 323 (1991) (quoting *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984)); *see Dalehite v. United States,* 346 U.S. 15, 28 (1953) (surveying the legislative history of 28 U.S.C. § 2680(a) and concluding that "it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function") *and Varig Airlines,* 467 U.S. at 813-14 (noting that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals"). As the Court of Appeals for the Ninth Circuit recently concluded, "[t]he discretionary

function exception marks the boundary between Congress' willingness to impose tort liability on the United States and the desire to protect certain decision-making from judicial second-guessing." *Conrad v. United States,* 447 F.3d 760, 764 (9th Cir. 2006) (citation omitted).

Congress in enacting section 2680(a) was less than specific about the outer boundaries of its liability exemption, however. The statute does not define the term "discretionary function." Difficult line-drawing is required to determine whether the conduct challenged in a specific case presents the type of "governmental decision-making" that Congress intended to shield from judicial review, as "[v]irtually any government action can be traced back to a policy decision of some kind." *Shansky v. United States,* 164 F.3d 688, 693 (1st Cir. 1999). In discharging their gate-keeping duties under 28 U.S.C. § 2680(a), the federal courts have struggled to prevent the discretionary function exception from swallowing the general rule of the waiver of sovereign immunity at 28 U.S.C. § 1346(b)(1). *See Gen. Dynamics Corp.,* 139 F.3d at 1284 (noting statutory tension and refusing to shrink "the exception to a mere formality"); *Smith v. United States,* 375 F.2d 243, 246 (5th Cir. 1967) ("If the [FTCA] is to have corpuscular vitality to cover anything more than automobile accidents in which governmental officials were driving, the federal courts must reject an absolutist interpretation of [the discretionary function exception]."); *Zigler v. United States,* 954 F.2d

430, 432 (7th Cir. 1992) (finding that the discretionary function exception is merely "shorthand for invoking a judicial responsibility for determining the scope of governmental accountability for its conduct"); *Varig,* 467 U.S. at 813 (recognizing that it is "unnecessary – and indeed impossible – to define with precision every contour of the discretionary function exception").

2. The Two-Prong Test

Although they do not cut the Gordian Knot, the decisions of the Supreme Court in *Varig Airlines, Berkovitz v. United States,* 486 U.S. 531 (1988), and *Gaubert* together set the contours of the discretionary function exception as it now stands. "In assessing whether the discretionary function exception applies to a particular case, we look to the nature of the conduct, rather than the status of the actor." *Conrad* 447 F.3d at 764 (citations and internal quotations omitted). The challenged conduct must be assessed in two ways.

"First, the question is whether the action taken by the government employee is a matter of judgment." *Id.* at 764-65 (citation omitted). Section 2680(a) is not implicated "if there exists a statute, regulation or policy mandating particular conduct by a government employee and the statute, regulation, or policy does not allow for the exercise of discretion in fulfilling that mandate." *Id.* at 765. "The exception will not apply in such a case because the government

employee will have no choice but to follow the mandatory directive." *Id.* Merely establishing that "the government employee ha[d] a 'choice' regarding how to act in a particular circumstance," and that the choice led to the events being litigated, is not sufficient to invoke Congress' liability exemption, however. *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995). As the reported decisions make clear, "not all actions that require choice – actions that are, in one sense, 'discretionary' – are protected as 'discretionary functions' under the FTCA." *Id.*

"[O]nce it has been determined that the challenged conduct involves an element of discretion," the second question "is whether the discretion is the type of decision-making that the discretionary function exception was designed to protect." *Conrad*, 447 F.3d at 765. The second step of the discretionary function test is designed to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Id.* (citation and internal quotations omitted).

Gaubert itself provides the paradigmatic example of conduct undertaken in the absence of a specific proscription that is "grounded in policy" and therefore shielded from review. 499 U.S. at 325. In that case, the day-to-day decisions of federal bank regulators regarding the management of a troubled savings and loan association were exempted from judicial scrutiny because they "implicated social, economic, or political policies." *Id.* at 322. The Court contrasted this

policy-based conduct against the "garden-variety" discretion that is not protected under section 2680(a):

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. at 325 n.7. In this important footnote, the Supreme Court acknowledged the core residuum of negligence that is not shielded from judicial scrutiny by Congress' far-reaching liability exemption. *See Fang v. United States*, 140 F.3d 1238, 1242 (9th Cir. 1998) ("[T]he United States is *not* immune . . . when the claims do not concern actions which are the product of judgment driven by the consideration of competing policy-based choices.") (emphasis in original); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (careless maintenance of a lighthouse triggers liability); *Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000) (the failure to perform a diligent inspection of dangerous equipment out of

laziness or because of careless inattentiveness is not shielded by the discretionary function exception).

The Supreme Court in *Gaubert* went on to state, however, that "[w]hen established governmental policy . . . allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." 499 U.S. at 324. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are *susceptible* to policy analysis." *Id.* at 325 (emphasis added). *Gaubert* creates a presumption of immunity when a federal employee takes action in the absence of a mandatory directive that, by its very nature, is "fraught with . . . public policy considerations." *Cope,* 45 F.3d at 449 (citation and internal quotations omitted). Thus, "the challenged decision need not actually be grounded in policy considerations so long as it is, by its nature, susceptible to a policy analysis." *Vickers,* 228 F.3d at 951 (citation and internal quotations omitted). A plaintiff may overcome this presumption only by establishing that "the challenged actions are not the kind of conduct that can be said to be grounded in . . . policy." *Gaubert,* 499 U.S. at 325.

The *Gaubert* analysis appears straightforward: injurious conduct that is both discretionary and susceptible to policy analysis is presumptively shielded from judicial review. But the discretionary function exception has no logical stopping point when

stated in the abstract. "To put the point in a more economistic way, virtually any action, public or private, that purports to be rational reflects some form of cost-benefits analysis." Peter H. Schuck & James J. Park, *The Discretionary Function Exception in the Second Circuit,* 20 Quinnipiac L.Rev. 55, 66 (2000). Thus, the *Gaubert* Court carefully noted the practical limits of its holding by way of its negligent driving example. Discretionary decisions not imbued with policy choices are susceptible to judicial review if otherwise actionable under state law. To be immunized under section 2680(a), "the challenged action must itself entail a policy choice, and it must be implemented in a manner consistent with the purposes of the authorizing policy." Shuck and Park, *supra* at 73. Determining whether the conduct challenged in a particular case falls within that core residuum of negligence requires careful review of the operative facts. Conduct that is negligent, even grossly negligent, does not perforce clear the discretionary function hurdle. *Vickers,* 228 F.3d at 950 ("Under the FTCA, negligence in performing discretionary functions," however egregious, "is not actionable.").

The fact-intensive nature of the discretionary function inquiry is affirmed in the reported cases. "For the discretionary function inquiry to have any meaning, it must be applied to specific, concrete instances of conduct." *Coyne v. United States,* 270 F. Supp. 2d 104, 116 (D.Mass. 2003), *rev'd on other grounds,* 386 F.3d 280 (1st Cir. 2004). The Court of

Appeals for the First Circuit similarly concluded that "[u]nifying principles" may be drawn from the decisional landscape, but the applicability of the discretionary function exception is "not subject to resolution by the application of mathematically precise formulae." *Shansky*, 164 F.3d at 693 (concluding that a "case-by-case approach is required"). In light of these precedents, the court must determine whether there is any policy justification that suffices, under the facts found above, to "prime the discretionary function pump." *Id.*

For the reasons set forth below, this case presents a rare instance in which section 2680(a) does not apply to shield the grossly negligent conduct of federal investigative officers.

3. Step One: The Analysts Exercised Discretion

The first step of the discretionary function test is satisfied because no "statute, regulation or policy" formally mandated that the analysts consider the data they collected in a particular manner. The Special Agents in charge of Operation Green Prickly Pear instructed the four Task Force analysts to provide them investigative leads in the form of positive suspect identifications on the basis of the information gathered from the wiretap intercepts. Special Agents Geohegan and Carter left the analysts free to come to their own conclusions about how best to fulfill that duty throughout the course of the Operation. For example, the Task Force analysts were not required by any specific prescription to place

a copy of the only direct link between the illegal conduct and the alleged perpetrator, the administrative subpoena return, in the controlling target folder.

4. Step Two: The Exercise of Discretion Is Not Shielded from Review

The challenged conduct, though discretionary, is nevertheless susceptible to judicial review. As set forth above, a plaintiff may overcome the *Gaubert* presumption only by showing that the "challenged actions are not the kind of conduct that can be said to be grounded in the policy . . . regime." 499 U.S. at 325. The focus of the inquiry is not on the "agent's subjective intent," but rather on the "nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* Plaintiff has met this burden.

i. Section 2680(a) in Law Enforcement Investigations

It is well established that "decisions to investigate, or not, are at the core of law enforcement activity," and also that such judgment calls are "precisely the kind of policy-rooted decision making" that the discretionary function exception "was designed to safeguard." *Kelly v. United States,* 924 F.2d 355, 362 (1st Cir. 1991). As a general matter, once the decision to investigate is made, "Congress did not intend to provide for judicial review of the quality of the investigation as judged by its outcome." *Pooler v. United States,* 787 F.2d 868, 871 (3d Cir. 1986), *cert. denied,* 479 U.S. 849 (1986). "The sifting

of evidence, the weighing of significance, and the myriad other decisions made during investigations plainly involve elements of judgment and choice." *Sloan v. Dep't of Hous. and Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001). Applying these principles, the court in *Rourke v. United States* held that "claims based upon an erroneous decision to prosecute a suspect later shown to be innocent of the crime for which he was arrested are not actionable since the officers' decision to arrest and prosecute is a discretionary function of law enforcement officers." 744 F. Supp. 100, 103 (D.Pa. 1988), *aff'd* 909 F.2d 1477 (3d Cir. 1990); *see also Littell v. United States*, 191 F. Supp. 2d 1338, 1345 (D.Fla. 2002) ("The overwhelming consensus of federal case law establishes that criminal law enforcement decisions – investigative and prosecutorial alike – are discretionary in nature, and therefore, by Congressional mandate, immune from judicial review.") (citation and internal quotation omitted).

The United States in its briefs and at trial urged the court to exempt the discretionary conduct of its intelligence analysts from judicial review with citation to the broad holdings of these cases and others like them. (Doc. # 61 at 11-13.) It cannot be denied that the discretionary function exception applies with special force in the law enforcement context. The negligence calculus may not be applied profitably to the discretionary decisions involving unquantifiable policy variables that are the province of police officers and police investigators. Were

section 2680(a) not available to shield review, "law enforcement tactics would become hesitant, apprehensive and less effective," *McElroy v. United States*, 861 F. Supp. 585, 592 n.13 (D.Tex. 1994), and "every mistaken prosecution, however innocent, and, indeed, every investigation which leads to a 'good' arrest but does not result in a conviction would become a potential lawsuit." *Rourke*, 744 F. Supp. at 106. "Such a threat could not help but have a deleterious effect upon law enforcement." *Id.*

But the discretionary function exception is a test, not a per se rule of governmental immunity for all law enforcement activities involving judgment. Accepting the Government's contention would not only eviscerate the second step of the *Gaubert* analysis, it would drain the Federal Tort Claims Act of its "corpuscular vitality" by permitting the discretionary function exception to swallow the FTCA's waiver of sovereign immunity. *Smith*, 375 F.2d at 246; *Cope*, 45 F.3d at 449. "The mere presence of choice," even if it that choice involves law enforcement, "does not trigger the exception." *Id.* Therefore, the court must determine whether the analysts' conduct can be said to be "*grounded* in . . . policy." *Gaubert*, 499 U.S. at 325 (emphasis added). To be grounded in a policy, the decision must, at a minimum, be consistent with it. Shuck and Park, *supra* at 73. The decisional landscape upon which the Government so heavily relies informs the court's analysis, but the applicability of the exception must turn on close consideration of the actual conduct that

the United States seeks to shield from judicial review. A survey of this caselaw is instructive in this regard.

ii. The Reported Decisions

The discretionary function exception has been applied to shield review of the negligent investigation and arrest of a person later determined to be innocent of the charged offense. *E.g., Pooler,* 787 F.2d at 869, 871 (Negligent methods chosen by a federal police officer to investigate marijuana dealing at a federal hospital, such as the failure to "verify, corroborate or surveil any of the drug transactions [culminating in the arrest]," were discretionary functions because "Congress did not intend to provide for judicial review of the quality of investigative efforts."); *Sabow,* 93 F.3d at 1452 n.6, 1453-54 (Police investigators' mishandling, alteration, and failure to preserve physical evidence; failure to obtain physical evidence such as finger nail scrapings; irregularities in the autopsy and interviewing procedures; and failure to consider all the evidence were shielded from judicial review because "[i]nvestigations by federal law enforcement officials . . . clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation," and the types of "social and political judgments that Congress meant to shield from FTCA challenges" were implicated because "[t]he investigation . . . was potentially influenced by a specific, highly political series of events . . . [and] intertwined with political and social considerations.");

Dueno v. United States, 165 F. Supp. 2d 71, 74 (D.P.R. 2001) (plaintiff's claim that IRS and FBI agents negligently investigated and handled evidence barred by the discretionary function exception); *Wright v. United States,* 963 F. Supp. 7 (D.D.C. 1997) (police officer's intentional omission of relevant information in application for a search warrant not actionable because the function of identifying what evidence to submit to a judicial tribunal is discretionary).

Judicial review of negligence in the procurement of a search warrant by federal law enforcement officers has also been foreclosed by the discretionary function exception, especially when the error was occasioned by exigent circumstances. *E.g., Doherty v. United States,* 905 F. Supp. 54, 56 (D.Mass. 1995) (Federal officers tasked with the investigation of an armed robbery erroneously applied for a warrant to search the home of a person with no connection to the crime solely on the basis of evidence derived from a confidential informant; the conduct was not reviewed because "law enforcement personnel made a judgment based upon their discretion to seek a search warrant upon the information *which they had at the time,*" a decision "based upon the public policy of preventing crimes by acting with expedition," that "cannot be inhibited by the threat of tort action based merely on negligence . . . [as] the primary concern at the time . . . was preventing the criminals from using or moving and secreting the firearms . . . [and] to move with dispatch to avoid any further violent acts against the public.") (emphasis in original); *McElroy,*

861 F. Supp. (negligence of federal narcotics officers in conducting surveillance and investigating evidence, which led to a raid on the wrong residence and the detention of innocent persons, held not actionable under the FTCA because the challenged decisions were grounded in policy and made under exigent circumstances); *Mesa v. United States,* 123 F.3d 1435, 1438 (11th Cir. 1997) (DEA agents not liable for executing arrest warrant for *a* Pedro Pablo Mesa against *the wrong* Pedro Pablo Mesa because "decisions regarding how to locate and identify the suspect of an arrest warrant and regarding whether the person apprehended is in fact the person named in the warrant are discretionary in nature and involve an element of judgment or choice" such as the "urgency of apprehending the subject in light of such factors as the potential threat the subject poses to public safety and the likelihood that the subject may destroy evidence;" the "desire to keep the investigation secret for tactical reasons, to protect confidential sources, [or] to protect agents involved;" and the optimal allocation of available law enforcement resources.).

iii. The Specific Facts of this Case

The Government has not cited a case in which the discretionary function exception has been applied to shield review of a federal agent's decision to blind himself to all of the primary evidence that he himself solicited in favor of inherently unreliable secondary data collected by somebody else. This conduct has no

analogue in the reported decisions. To see why, it is helpful to first establish what Plaintiff does not allege.

Plaintiff does not attack the intelligence analysts' "decision to investigate" an innocent person, which decision is fully immunized by section 2680(a). *Kelley,* 924 F.2d. Plaintiff does not challenge the "sifting of the evidence" or the "weighing of significance" that led to the misidentification of Scott Curtis Kerns. *Sloan,* 236 F.3d at 762. There simply was no deliberation between the two conflicting data sets. Judicial "review of the quality of the investigation as judged by its outcome" is foreclosed by the discretionary function exception, and Plaintiff does not request it. *Pooler,* 787 F.2d at 871. The liability-shielding policy articulated in *Doherty,* preventing crimes by acting with expedition on the basis of reasonably available evidence, is of little moment. Here there were no exigent circumstances that could in any way inconvenience the analysts in reviewing the only inculpatory information, which they collected and had available for the 97 persons they chose to indict. Plaintiff does not second guess the analysts' allocation of the available law enforcement resources. The analysts spent four months analyzing data to ensure that they provided the correct name to Special Agent Carter for indictment.

Finally, Plaintiff does not impugn the analysts' choice of investigative methodology in deciding what evidence to collect. *Sabow,* 93 F.3d. What Plaintiff challenges is the analysts' failure to consider when

seeking indictment the very evidence that they deemed important enough to request and from which all of their other evidence was derived. As the findings of fact make clear, the analysts ousted the telephone subpoena return persona in favor of the DMV records persona without any plan, conscious justification, or reflection. The analysts' total disregard of the only link between the criminal conduct and the person responsible for that conduct was inconceivable to Special Agent Carter, and it is inconceivable to the court as well. Having determined that the subpoena return was essential to their investigation, the analysts could not, consistent with that judgment, disregard it when seeking indictment.

This conduct cannot be said to be *grounded* in a policy decision, for no conceivable law enforcement interest could be furthered by the total abandonment of the primary inculpatory and exculpatory data. The analysts' omission, far from comporting with a policy of reasonably reliable suspect identification, directly violated that policy. "This amounts to a claim of professional negligence, not failed policy judgment." *Coyne,* 270 F. Supp. at 117 n.5. A discretionary decision (or non-decision) not to consider the essential data readily at hand is not imbued with a policy choice. Therefore, the analysts' omission is properly analogized, not to the conduct of any of the law enforcement officers in the reported decisions, but rather to the conduct of a government employee who, while driving his automobile on a mission connected

with his official duties, negligently collides with another car. *Gaubert*, 499 U.S. at 325 n.7.

Having chosen to drive, a federal employee may not pass through a four-way intersection, at full speed, without ever pausing to look for oncoming traffic. Judicial review of such a negligent exercise of driving discretion is appropriate because "these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Id.* In like manner, having decided what critical identifying information to gather, the intelligence analysts in this case may not blind themselves to their own policy choice by ignoring, without justification or credible explanation, the very evidence that their policy provided them. Investigating, like driving, requires the constant exercise of discretion. However, the analysts are not protected by section 2680(a) because the grossly negligent choices they made while exercising that discretion cannot be said to be grounded in law enforcement policy.

The finding of liability in this case will have no prospective effect on investigative methodology or law enforcement procedure. This decision creates no incentive to change existing police policy and will not cause law enforcement tactics to become "hesitant, apprehensive and less effective." *McElroy*, 861 F. Supp. at 592 n.13. The court's decision in no way impinges upon Arizona's stated policy of ensuring "continued vigorous police work." *Landeros*, 171 Ariz. at 475, 831 P.2d at 851 (noting that the "active investigation and prosecution of crime" often requires

investigative agents to "make quick and important decisions as to the course an investigation shall take"). The court merely holds that federal agents, when conducting investigations in the absence of exigent circumstances, may not refuse to look at what they know to be the most dispositive evidence they chose to collect.

The Government does not suggest that, had the analysts placed the subpoena return in the target folder, they might have chosen to disregard the subscriber information exculpating Plaintiff on the basis of a policy choice. No such deliberation occurred here. Plaintiff challenges the analysts' total failure to consider the data that they themselves subpoenaed at any time after using it to get a DMV photo. This conduct is at the extreme edge of the continuum of investigatory discretion generally insulated from judicial review. Unless the Federal Tort Claims Act is absolutely inapplicable in the law enforcement context, the discretionary function exception cannot apply to shield this conduct from judicial review.

D. Entitlement to Relief

Plaintiff is entitled to judgment against Defendant pursuant to 28 U.S.C. § 1346(b)(1) in the amount of $200,000.00.

DATED this 21st day of February 2007.

/s/ Neil V. Wake
Neil V. Wake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott Curtis Kerns, Plaintiff, v. United States of America, Defendants.	**JUDGMENT IN A CIVIL CASE** CV-04-1937-PHX-NVW (Filed Feb. 21, 2007)

Pursuant to the Court's order filed this date and up on the Court's instruction therein, judgment is entered for the Plaintiff, Scott Curtis Kerns, and against Defendant, United States of America in the amount of $200,000.00.

JUDGMENT ENTERED this 21 day of February, 2007.

RICHARD H. WEARE
District Court Executive/Clerk

s/ Deborah N. Herman
By: Deputy Clerk

cc: (all counsel)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT KERNS, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	No. 07-15769 D.C. No. CV-04-01937-NVW District of Arizona, Phoenix ORDER (Filed Jun. 8, 2009)

Before: CANBY and WARDLAW, Circuit Judges, and MILLS,* District Judge.

The panel voted to deny Appellee's petition for rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc and Judges Canby and Mills so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

IT IS SO ORDERED.

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.